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No. 94-1380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

AJ & AJ SERVICING, INCORPORATED, and ROBERT JACOBS,

Petitioners,

v.

TUDOR ASSOCIATES, LTD., II and JOSEPH N. CALLAWAY, TRUSTEE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY BRIEF

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Respondents' 23-page Brief in Opposition does not challenge the two central assertions in our Petition that justify this Court's exercise of its discretionary jurisdiction.

1. Respondents apparently acknowledge that the decision below conflicts with this Court's holding in *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994), that requires appellate courts to determine whether the amount of a punitive-damage award is arbitrary. *See* Petition 8-10.

2. Respondents apparently acknowledge that there is a conflict among the federal courts of appeals over the standard of appellate review of punitive-damage awards. *See* Petition 14-17.

Recognizing that these are cogent reasons warranting favorable action by this Court, the respondents have turned, instead, to the diversionary tactic of claiming that the petitioners' challenge to the punitive-damage award was "not preserved." Respondents' contention is simply false.

A. ***Petitioners Consistently Challenged the Award of Punitive Damages.***

(1) **The District Court.** — Respondents falsely state that we "admit" that the *size* of the award was not challenged by petitioners in the district court. Br. in Opp. 9. We made no such "admission," and the record clearly proves the contrary.

After the jury's verdict, petitioners moved to set aside the judgment under Rules 50 and 59 of the Federal Rules of Civil Procedure. Petitioners principally sought judgment notwithstanding the verdict on the punitive-damage award on the ground that North Carolina's punitive-damages scheme was unconstitutional as a matter of law. *See* Memorandum In Support of Defendants' Post-Trial Motions at 8-10. Petitioners also sought a new trial based on "[t]he punitive damages award in this excessive amount . . . ." *Id.* at 28. Petitioners argued, *inter alia*, that "any attempt by the jury to 'punish' these defendants was based on the degree of prejudice and passion which plaintiff's counsel could incite in the jury." *Id.* at 29. Petitioners argued that "more than adequate evidence exists for this Court to grant a new trial based . . . on the excessive damage awards of the jury . . . ." *Id.* at 33. The trial judge granted the motion for

new trial on the issue of punitive damages, though he declined to hold North Carolina's punitive-damage scheme unconstitutional. *See* Pet. App. 38a-39a, 48a.

(2) **The Court of Appeals.** — At the appellate stage, petitioners were *defending* a decision that set aside the punitive-damage award altogether. They therefore had no occasion to challenge the precise amount of the award. In their Reply Brief (p. 15), petitioners defended the district judge's determination that it was "unconscionable" to award punitive damages in the amount of seven million dollars in a lawsuit that basically concerned "a complex commercial transaction involving the sale and management of four commercial properties and . . . the interpretation of various complicated agreements." And in their cross-appeal, petitioners specifically argued that North Carolina's system of punitive damages was unconstitutional because it failed to articulate standards for post-verdict review of punitive damage awards. *See* Appellees' Brief at 29-33.

Respondents concede that petitioners "repeatedly argued that no jury instruction or post-verdict review criteria could be formulated, and *no appellate oversight* by the Fourth Circuit Court of Appeals could be afforded, that would meaningfully limit the *size* of any punitive damages award in North Carolina." Br. in Opp. 4 (emphasis added). Respondents further acknowledge that petitioners "argued at every stage of the proceedings that it was not possible for the trial judge and the court of appeals to engage in meaningful post-verdict review of the jury's punitive damages award under North Carolina law." Br. in Opp. 12.

(3) **Petition for Rehearing.** — After the Fourth Circuit's decision to reinstate the jury's punitive damage award, petitioners sought rehearing on the standard of review to be applied by an appellate court when reviewing

a district court's decision to set aside a punitive damage verdict as excessive. The petition for rehearing and suggestion for rehearing in banc specified that the court should reconsider the panel decision relating to the "'grant of a new trial on the issue of the *amount* of punitive damages . . . .'" *See* Petition For Rehearing And, Alternatively, Suggestion For Rehearing In Banc at 8 (emphasis added) (quoting *Defender Indus. v. Northwest Mut. Life Ins. Co.*, 989 F.2d 492, 507 (4th Cir.) (*in banc*), *cert. denied*, 113 S. Ct. 3038 (1993)). Contrary to respondents' representation (Br. in Opp. 10), petitioners *did* seek, after the Fourth Circuit's decision, to raise the issue of the responsibility of a federal appellate court in reviewing a judgment setting aside a punitive damages verdict as excessive.

Moreover, in their rehearing petition, petitioners asked the Fourth Circuit to grant rehearing to consider the constitutional challenge raised by petitioners in their cross-appeal. Petitioners had squarely challenged the constitutionality of the North Carolina system of punitive damages precisely because it did not provide sufficient post-verdict review of punitive damage awards. To say, in light of this history, that the issues petitioners are raising were "not raised in the Court of Appeals" (Br. in Opp. 9) is grossly misleading. And to compare it to *United States v. Alvarez-Sanchez*, 114 S. Ct. 1599, 1605 n.5 (1994), in which a petitioner who had previously argued that a confession should be suppressed on Fifth Amendment grounds sought suppression in this Court under the Fourth Amendment, is wholly inappropriate. [1]

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[1] *Equal Employment Opportunity Comm'n v. Westinghouse Elec. Corp.*, 925 F.2d 619, 631 (3d Cir. 1991), and *James v. Jacobson*, 6 F.3d 233, 243 (4th Cir. 1993), also cited by respondents, support petitioners' position. The court in *Westinghouse* explicitly found that remand would be the appropriate course where a district court had relied on an incorrect

B. *Petitioners Did Not "Invite Error."*

Respondents assert that petitioners "invited error" because they argued in the trial court that the punitive-damage jury instruction proposed by respondents was not justified under North Carolina law. [2] Respondents contend that by arguing against the proposed jury instruction, "[petitioners] left no review function for the court of appeals to perform." Br. in Opp. 12.

This argument assumes that the *only* role of trial and appellate courts in reviewing the amount of a punitive-damage award is to apply the criteria stated to the jury. While respondents do not articulate their argument precisely, they must assume, in order to make their argument, that the size of a punitive-damage verdict may be reviewed by a district court or a court of appeals only under the standards incorporated in the instructions to the jury.

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legal standard. Similarly, in *James*, the court ordered a remand for the trial court to apply the court of appeals' decision in view of the court's "recognition of the continued superiority of the trial court's vantage point in making this sort of discretionary decision respecting the conduct of trials -- whether originally or even following appellate review and correction."

[2] We stated in our Petition that the North Carolina courts had "rejected" the jury instruction ultimately endorsed by the Fourth Circuit (Petition 11 n.1). A more precise statement is that the North Carolina courts had declined to endorse the instruction on five occasions in which the courts had considered North Carolina's punitive-damage scheme. In light of this failure to adopt the instruction, petitioners argued in good faith that the instruction ultimately adopted by the Fourth Circuit was not an accurate prediction of North Carolina law. This is a far cry from the typical case of "invited error" in which a party proposes a jury instruction and then argues that the instruction was error.

But that is the very same issue that has divided the courts of appeals. The Fourth Circuit assigns almost no post-verdict role to the appellate court in assessing the reasonableness of a jury's award of punitive damages, relying instead on the jury. The Fourth Circuit's view has been expressly rejected by the Ninth Circuit. In a recently published opinion, the Tenth Circuit has also applied a standard of judicial review inconsistent with the Fourth Circuit's. *See Continental Trend Resources, Inc. v. OXY USA Inc.*, 44 F.3d 1465, 1475, 1477-78 (10th Cir. 1995).

Respondents' argument also ignores this Court's holding in *Honda Motor Co. v. Oberg*, 114 S. Ct 2331 (1994). The punitive-damage scheme struck down in *Honda Motor Co.* included a provision for "detailed jury instructions." 114 S. Ct. at 2341. It also permitted the trial judge to order a new trial "if the jury was not properly instructed, if error occurred during the trial, or if there is no evidence to support any punitive damages at all." 114 S. Ct. at 2338. This Court nonetheless found that the detailed instructions and other safeguards provided under Oregon law did not satisfy the due process requirement of judicial review of the amount of a punitive damage. Respondents' argument relies on a role for appellate courts that is inconsistent with *Honda Motor Co.*

CONCLUSION

Respondents seek to prevent review by maligning petitioners' conduct as "reprehensible," "fraudulent," "intentionally tortious," "deceit[ful]," "egregious," and "unscrupulous." Br. in Opp. 8, 9, 14, 16, 22. Respondents go so far as to misrepresent that the trial judge analogized the petitioners "to a criminal" (Br. in Opp. 15), when this portion of the trial court's opinion referred only to the court's summary of the inflammatory closing jury argument made by respondents' own trial counsel. *See* Pet. App. 47a. [3]

To be sure, the jury returned a verdict against petitioners, and it determined to punish petitioners in a staggering amount. [4] The question presented for review is whether the court of appeals was obligated to consider the size of the jury's punitive-damage award. As this Court stated in *Honda Motor Co.*, "[w]hat we are concerned with is the possibility that a guilty defendant may be unjustly punished; evidence of guilt warranting some punishment is not a substitute for evidence providing at least a rational basis for the particular deprivation of property imposed by the State to deter future wrongdoing." 114 S. Ct. at 2339.

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[3] The trial judge concluded not that petitioners were criminals but that "this was in fact a simple contract action" (Pet. App. 27a).

[4] Respondents are wrong when they say repeatedly that there was a seven-to-one ratio between the punitive and compensatory damages awards. The jury returned a compensatory verdict of $529,696.50 and a punitive damage award of $7 million -- a ratio closer to fourteen-to-one.

As in *Honda Motor Co.*, the issue is *not* whether there is evidence to support some award of punitive damages. The Court in *Honda Motor Co.* noted that "the review provided by Oregon courts ensures only that there is evidence to support *some* punitive damages, not that there is evidence to support the amount actually awarded." 114 S. Ct. at 2339. The same can be said of the procedure followed by the Fourth Circuit. Consequently, the petition for certiorari should be granted and the judgment of the Court of Appeals should be vacated or the case should be set for argument following *BMW of North America, Inc. v. Gore*, No. 94-896.

Respectfully submitted,

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